Supreme Court of the United States.

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OCTOBER TERM, 1901.

No. 4, Original.

STATE OF MINNESOTA

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR, AND BINGER HERMANN, COMMISSIONER OF THE GENERAL LAND OFFICE.

REPLY BRIEF.

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REPLY BRIEF.

I.

While not deeming it material to this case that the land in question had or had not been erected into an Indian reservation, we desire to make the following suggestions in reference to the proposition discussed under the first point of defendants' brief:

It will be noted that it is claimed that the country in question is an Indian reservation, to which the Indians have in some manner obtained greater rights than those which are incidental to their primary right of occupancy of unceded territory.

Referring to the treaty of 1863, cited by counsel on page

21 of his brief (13 St., 667), it will be noted that article 6 does not specifically refer to the Red Lake Indian reservation or to any particular reservation. It does provide that the President shall appoint a board of visitors, and makes provision for compensation for their services, and requires them "to report the qualifications and moral deportment of all persons residing upon the reservation under the authority of law."

We did not claim in our main brief that this provision of article 6 had reference to the reservation of 640 acres to each of the chiefs, "Moose Dung" and "Red Bear," under article 9. But what we do claim is that article 9 provides for the only reservation in this treaty. There is nothing to indicate that article 6 refers to this unceded country, and even if it does, it does not create a reservation, or grant to the Indians any rights beyond what they already had. It designates no boundaries, it fixes no limits, and makes no conditions as to occupancy. All of the Indians in northern Minnesota were at all the times above referred to and are now Chippewa Indians. They consisted of various bands occupying an extensive territory in northern Minnesota, which embraced the tract of country now in question.

Previous to 1863 there had been several Indian reservations set aside pursuant to treaties with the Indians and various acts of Congress, and especially pursuant to the treaty of February 22, 1855 (10 St., 1165), in which the Indians ceded the country east and south of the land in question.

By reference to this statute it will be seen that the President was required to cause several reservations to be set aside for different bands of Chippewa Indians, to wit, the Mississippi bands of Chippewa Indians, the Pillager and Lake Winnibigoshish bands, and others. These reservations, as they existed in 1889, are shown on the map, which we shall produce to the court. They were all in existence when the treaty of 1863 was made. The various appropria-

tion bills referred to by counsel on page 20 of his brief will be found simply to appropriate money to pay the *per diem* and mileage of the commissioners to be appointed to visit the missions, and have no reference whatever to any particular Indian reservation.

We have sufficiently mentioned the order of the President of March 18, 1879, enlarging the White Earth reservation, but we take this occasion to correct an error appearing in our main brief. We there stated that said order is attached to our own brief as Appendix B. This was an error. It was not so attached, but does appear in the brief of the defendants.

The only other matter under this head that we desire to refer to is the case of Spaulding *vs.* Chandler, 163 U. S., 394; and of that case it is sufficient to say that under the treaty of 1820 the United States agreed to secure to the Indians a perpetual right of fishing at the falls of St. Mary, and also a place of encampment upon the tract ceded by that treaty, convenient to the fishing grounds. By another treaty of 1836 it was provided that the reservation for the place of fishing and encampment made under the treaty of 1820 should remain unaffected. Furthermore, it was provided by act of Congress that the Secretary of War should cause to be designated upon a map the position and extent of the Indian reserve, and this was done. The Indians were thereby guaranteed the perpetual right of occupancy and fishing. This was a greater right than they had as original occupiers of the soil of that country. This is evidenced by the fact that in 1855, when they gave up this right of fishery, it was done by a treaty specifically ceding their rights to the Government.

The court, speaking by Mr. Justice White, there say:

"The clear duty rested upon the Government to see that a tract was reserved for the purposes designated in the treaty (United States *vs.* Carpenter, 111 U. S., 347–'9). If a survey was necessary for that purpose, it was the duty of

the Government to cause such survey to be made, and it appears from the evidence that in 1845, in a survey made by the authority of the Government the exterior boundaries of the Indian reservation were delineated upon the map of the surveys then made, and such boundaries were subsequently adopted in the survey under the act of 1850."

We close this branch of the brief by saying that Congress never granted to the Indians in the Red Lake country any greater rights than they originally had as primary occupiers of the soil. It is idle to say that from long occupancy an Indian reservation will be presumed. We think it will rather be presumed that the original state of the Indians as occupiers of the soil continued. This was so held by Judge McCreary in the case we cited in the original brief.

II.

We now desire to particularly call the court's attention to the defendants' second point, because it is vital to this case. Counsel lays great stress upon the fact that the lands in controversy never became public lands, and so never became subject to the State school land grant. He bases this claim upon the construction which this court has placed upon grants to railroads, wherein it has been held that such grants attach only to so much of the public domain as was at the time when the grants were made subject to sale or other disposition by the Government, and not encumbered by any claim.

As to railroad and similar private grants, it is held that if, at the time when the grant is made, and, in some cases, when the railroad is definitely located, any part of the land is encumbered by a settlement under the homestead or preemption laws, or reserved for any public use, the grant does not attach to such lands, even though the right of the homestead settler, or other claimant, is thereafter forfeited or abandoned and the public use discontinued.

It is with reference to these particular grants and this condition of circumstances that the terms "public lands" and "public domain" are employed by the court in the cases cited by counsel.

Such grants are strictly construed against the grantee. They are construed to be grants *in præsenti*, only to attach to such public lands as are absolutely free from claim, and the title, right to possession, and disposition may pass at once to the railroad company. Directly to the contrary is the rule as to school land grants. As to them the rule is well settled in this court that the title passes to the State subject to any prior right of occupancy by the Indians, or others, which the Government had stipulated to recognize. In other words, if at the time of the survey the land is upon an Indian reservation or unceded country, the State takes the fee subject to this encumbrance, and may await the extinguishment of the Indians' title or right; or, if any part of the land is covered by a pre-emption or homestead claim, it is not thereby excepted from the school land grant, but the State may await the extinguishment or abandonment of the encumbrance, and as to a settler, unless he completes and perfects his title, the State's right will attach. In other words, as to all such adverse claimants they do not create exceptions from the grant, but are encumbrances upon it, and are therefore diametrically opposed to the rules which obtain in railroad grants and other private grants. This doctrine rests upon several considerations: (*a*) Such grants are liberally construed in favor of the State, and (*b*) it is known when such grants are made that much of the territory is encumbered either by Indian reservations or Indian right of occupancy.

This rule is so well established that it is scarcely necessary to cite cases in support of it. Following a long line of judicial and departmental decisions upon the subject, this court has, in the recent case of the *United States vs. Thomas*,

151 U. S., 577, clearly enunciated what must now be deemed the well-settled doctrine of this court.

See also the authorities cited on this proposition on pages 24 *et seq.* of the original brief.

III.

For the purpose of this discussion we here group together the remaining points of counsel's brief.

Counsel calls attention in the beginning of his brief, and under this head, to the fact that the quantity of school lands which the State shall receive is not involved in this discussion; that the State is entitled to select lands in lieu of those within the unceded Indian country, and that the grant to the State can be accomplished through the application of other lands of equivalent area where the specific sections are not available.

It is a matter of common knowledge that the public lands of Minnesota available for selection by the State in view of losses are entirely inadequate. There are undoubtedly public lands in Minnesota, but they are of little value, are widely scattered, and are in no way an adequate compensation for the loss of 197,000 acres in the territory in question. The expense necessarily incident to examination and selection of indemnity lands would make the grant of little value to the State. It should not be overlooked that valuable public lands in that State have rapidly disappeared in recent years.

It clearly was never the intention of Congress to place no stress upon the numerical designation of school sections, or to intend that the grant could always be satisfied by equivalent selections. Such a doctrine is wholly at variance with that announced in Cooper *vs.* Roberts, 18 How., 178, cited at page 21 of plaintiff's main brief. It is there stated that "this is a definite purpose declared to consecrate the same central section of every township of every State which might be

added to the Federal system." With equal force has that policy been expressed with respect to the additional section 36. Congress has nowhere departed from that policy in subsequent legislation. Whenever it has spoken at all upon the subject, it has been merely to make provision for original sections lost to the State by any of the causes recognized in the various acts of Congress.

It is not to be overlooked that the preservation of extensive territory in a state of wilderness for Indian occupancy, whether as erected into a reservation or otherwise, was never intended to be a fixed or permanent policy of Government in dealing with the Indians. The reservation was at best but a temporary expedient, a police regulation, destined to be supplanted by wiser measures. This fact was in the minds of the parties to the compact in 1857. The State had the privilege to await the passing of the reservation and the extinguishment of the Indian right of occupancy and then take the specific sections. She has exercised that right and now asks the fulfillment by Congress of its part of the agreement.

The case of Haydenfeldt *vs.* Daney Gold and Silver Mining Co., 93 U. S., 634, does not in the least militate against this doctrine. No question was then presented or considered affecting an Indian reservation. The facts in that case come squarely within the purview of the joint resolution of 1857.

Counsel has quite mistaken the contention of the State as to the doctrine advanced in *Beecher vs. Wetherby*, 95 U. S., 517. We claim little, if anything, in common between the *Haydenfeldt* and the *Beecher* cases. We know of no reason why the former should be referred to in the decision of the latter. In the earlier of these cases it was held that the State did not acquire the section in question because the same had been disposed of before survey, while in the latter it was held that by virtue of the terms of the grant to the State a section lying *within an Indian reservation* came within its

terms and passed to the State with the extinguishment of the Indian title.

Nor does State of Colorado (6 L. D., 412), cited in defendants' brief, advance any view at variance with what is now contended for by the State. Secretary Lamar there expressly states the rule which was subsequently quoted and adopted by this court in United States *vs.* Thomas, 151 U. S., at page 583. The case is cited at pages 24, 36, and 37 of plaintiff's main brief.

We have already discussed the meaning and scope of the joint resolution of 1857 in the main brief of the plaintiff; but in view of the importance of the question and the views advanced in defendants' brief, we feel at liberty to here renew and enlarge upon that discussion.

The memorial of the legislature of the Territory of Minnesota in relation to the school sections and the resolution of Congress of March 3, 1857, could not possibly have applied to unceded Indian country. We have sufficiently argued in our main brief that the joint resolution of Congress was not intended to be wider in its scope than the memorial on which it was based and which called forth the resolution.

The memorial asked Congress to pass a law authorizing the State to select lieu lands in place of lands taken by actual settlers under the pre-emption laws of 1841, or lands taken for town-site purposes under the act of Congress of 1844. As neither of these could be taken in an Indian reservation or unceded Indian country, therefore this memorial could not possibly have applied to lands within the unceded Indian country. Congress did not allow settlers in the Indian country. Pre-emption laws did not apply to it. The town-site law did not apply to it. The rights of third parties could not possibly have intervened in any way in any lands within the unceded Indian country; but as only a part of the State was at that time unceded Indian country, the entire southern part of the State was open to settlement, and

it was this settlement under the pre-emption laws or town-site laws that the memorial had reference to and that Congress had in mind when it passed the resolution of March 3, 1857.

A glance at the joint resolution will also show that Congress only had in mind the actual settler under the pre-emption laws of 1841 and under the town-site act of 1844, because the latter part of the act provides:

"And if *such settler* can bring himself or herself within the provisions of the act of Sept. 4, 1841, *or the occupants* of the town site be enabled to show a compliance with the provisions of the law of the 23rd of May, 1844, then the right of preference granted by the said acts, in the purchase of *such portion* of the 16th and 36th sections so settled and occupied shall be in them respectively as if such sections had not been previously reserved for public purposes."

The whole tenor of the resolution has reference to actual settlers or persons occupying under the town-site act, and only incidentally refers to other disposition in the language "or reserved for public uses," undoubtedly contemplating the provision of the act of Congress authorizing the formation of a State government, in which it was provided that "where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of the schools."

We think we have shown in our main brief that Congress had no intention to enlarge the scope of this pledge to the State or in the resolution to go beyond what was asked by the State in its memorial to Congress.

This construction harmonizes the reservation of the school sections in the organic act of Minnesota of March 3, 1849; the memorial of the territorial legislature of the 26th of February, 1856; the pledge contained in the act authorizing the formation of a State government of February 26th, 1857, and the resolution of Congress of March 3, 1857, passed five days later.

The memorial, as we have seen, was undoubtedly called out by the fact that in the organic act of Minnesota sections 16 and 36 in each township were absolutely reserved for the purpose of being applied to schools in the Territory and the future State. The act of Congress authorizing the formation of a State government, containing the language "that where either of said sections or any part thereof has been sold or otherwise been disposed of other lands equivalent thereto," etc., "shall be granted to said State," was passed, of course, a year after the memorial of the territorial legislature and five days before the resolution of Congress. It may well be that Congress was in doubt as to whether, in order to be excepted from the provisions of its proposition which was to be submitted to the State for acceptance, lands must be disposed of prior to the date of the acceptance of the proposition or prior to their survey; and, as it was in the interest of the public that the lands should be settled as rapidly as possible, it was deemed wise for Congress to specifically provide that actual settlers, under the pre-emption law and under the town-site law *made before the survey*, should have a prior right to the particular lands thus settled upon, and the State should select lieu lands in place thereof. With the exception of the disposition of small portions of the public domain for Government works, such as forts, arsenals, and military reservations, the pre-emption laws and the town-site act formed the only means of the disposition of the public domain at that time; so that this memorial covered the cases in which the public had the most interest, to wit, actual settlers upon the public domain, and the language in the joint resolution, "reserved for public uses before the survey," was probably intended, as we have seen, as an interpretation of the proposition to the State of Minnesota that lands "sold or otherwise disposed of" should mean sold or disposed of before the survey, instead of before the proposition made by Congress was accepted by the State.

This is not inconsistent with the holding in the case of

State of Minnesota *vs.* Bachelder, 1 Wallace, p. 109. To be sure, in that case the attorney general of the State and the attorneys for the defendant assumed that the joint resolution modified the original proposition, and Mr. Justice Nelson held that to the extent that the joint resolution of Congress was responsive to the application of the territorial legislature it was a valid exercise of the congressional power, but did not pass upon the question of whether Congress had power or intended to go beyond the application made by the State. Since the decision in the 1st Wallace the Supreme Court of the United States, in Haydenfeldt *vs.* Daney Gold and Silver Mining Co., 93 U. S., 634, has held that language substantially the same as the language in the enabling act of Minnesota should be construed to exempt lands settled upon prior to the survey; so that the decision in the Bachelder case as to this joint resolution was really unnecessary; but at that time, while it had been the policy of Congress and of the people of the United States to dedicate sections 16 and 36 for the public schools, the law on this subject was in its formative period, and undoubtedly the Congress acted upon the assumption that the proposition to the State contained in the enabling act would render void any settlement under the homestead laws made after said proposition was accepted by the people of Minnesota. But we venture to state that no one at that time had the remotest idea that this proposition to the State, the memorial of the territorial legislature, or the joint resolution of Congress had any reference to the disposition of an entire unceded Indian country for the benefit of those Indians after their right of occupancy had been extinguished. We do not think Congress intended to do this in the act of 1889, and we deny the power of Congress, if such was its intention.

These various acts should be read and considered together and in the light of the policy of Congress to promote the establishment of public schools.

In interpreting a statute or a constitutional provision, resort may properly be had to the history of the times, to the conditions of the country as they existed at the date of the enactment to the previous condition of the law and the object to be accomplished by the legislative body.

Holy Trinity Church *vs.* United States, 143 U. S., 459.

United States *vs.* Union Pacific R. R. Co., 91 U. S., 79.

Croomes *vs.* State, 51 S. W., 927.

Collins *vs.* New Hampshire, 171 U. S., 34.

United States *vs.* Wong Kin Ark, 169 U. S., 653.

In the case of Holy Trinity Church *vs.* United States, 143 U. S., 459, the court says:

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. This has been often asserted and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances.'"

In the case of the United States *vs.* Union Pacific Railroad, 91 U. S., the court says:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (Aldridge *vs.* Williams, 3 Howard, 24; Preston *vs.* Browder, 1 Wheaton, 120.")

"Many of the provisions of the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed."

A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the maker.

In the case of Croomes *vs.* State, 51 S. W., page 927, the court says:

"When it is plainly perceivable that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and carried out and made to control the strict letter," citing Black's Interpretation of Laws, page 73.

In the case of Collins *vs.* New Hampshire, 171 U. S., page 34, the court says:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In the case of United States *vs.* Wong Kin Ark, 169 U. S., page 653, the court says:

"In construing any act of legislation, whether a statute enacted by the legislature or a constitution established by the people as the supreme law of the land, regard is to be had not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted."

If our interpretation of the resolution of Congress and of the other acts is correct, then the solution of this case is very simple. The reservations which Congress had in mind for public uses would be reservations for incidental and governmental purposes, in which the land would be dedicated to some public use—such uses as were well known to Congress at that time and ever since. To contend that Congress intended more than this would be to claim the power in Congress to absolutely nullify its grant to the State. If Congress could sell the lands to private parties or provide for a sale of land to private parties in the future and dedicate the proceeds to any public purpose it saw fit, its promise to the State which it declared in its proposition, when accepted by the State should be obligatory upon the United States and upon the State of Minnesota, would be a rope of sand. Suppose Congress had provided in 1889 that all of the remaining lands in Minnesota, including the unceded Indian country and outside of this country, should be sold at public auction or private sale and the proceeds used to build a new executive mansion in Washington. The money would undoubtedly be appropriated to a public use, but would it be *such a public use as Congress had in mind* when it entered into its solemn agreement with the State of Minnesota? We say, first, that Congress had no such power; and, second, if we concede the power, that the act of 1889 was not intended to appropriate

that which had already been dedicated to the State, under well-known rules of construction which we have cited.

Why should there be any reservation of sections 16 and 36 in the act of 1889? They had already been reserved. They had already been declared to belong to the State. Congress had already adopted all the provisions necessary to carry out that intent. No patent, no selection, no certification by the Department, no act whatever was required to vest the title of these lands in the State, except identification by survey. Even in the selection of lieu lands it has been held that no patent was necessary; that the bare selection by the State vested the title.

Hedrick *vs.* Hughes, 15 Wallace, 123.
See also authorities in our main brief.

But even if we were to concede, for the purposes of argument, that Congress had the power to thus nullify its grant to the State, is it to be presumed that Congress ever intended to do so? We are seeking the intention expressed by Congress in the act of January 14, 1889, and it can never be presumed that Congress by that act contemplated the complete destruction of the grant it had made to the State as evidenced by the acts of 1849 and 1857.

THE ACT OF FEBRUARY 28, 1891 (26 STATS., 796), GRANTING THE OPTION TO THE STATE TO SELECT LANDS IN LIEU OF THOSE CONTAINED IN INDIAN RESERVATIONS, OR TO AWAIT THE EXTINGUISHMENT OF THE INDIAN TITLE AND TAKE THE SPECIFIC SECTIONS, IS A CLEAR CONCESSION OF THE STATE'S RIGHT, AND WHOLLY INCONSISTENT WITH THE CONTENTION URGED BY THE DEFENDANTS.

This is the first act of Congress specifically granting to the States and Territories the right to waive their claim to sections 16 and 36 in any Indian country or Indian reservation and to select lands in lieu thereof, and was evi-

dently adopted to give the State the option to procure its quota of lands without awaiting the extinguishment of the Indian title, which might in some instances be many years. No previous act of Congress has granted this right. It is perfectly evident that Congress did not understand that the States and Territories previously had this right. In all grants to the States with which we are familiar there is the usual clause contained in the grant to Minnesota, in substance, that if sections 16 and 36 have been sold or otherwise disposed of other lands equivalent thereto shall be granted to the State, but the courts had held that the States were entitled to their lands in the Indian country, and hence, in the light of these holdings, this statute was passed which gave the States the option to take the lands or to take lieu lands. The act specifically provides that if the State selects lieu lands, "it shall be a waiver to its right to said sections," *i. e.*, in the Indian country, and to make it more certain that the States had a right to those lands it provided "that nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian or other reservation, and the restoration of the lands therein embraced in the public domain, and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

But the counsel argues in his brief that the provision of this statute as to lands included within Indian, military, or other reservations means, not lands as a part of the reservation, but isolated pieces of land near the reservation to which the State had already received title and desired to surrender it in consideration of receiving other lands in lieu thereof, and quotes a decision of the Secretary of the Interior to this effect.

This construction is clearly at variance with the terms of the act. The act provides:

"And other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory where sections 16 and 36 are mineral land, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States."

If the lands were contiguous to, but not a part of the Indian or military reservation, and the surveys had been made, the title would absolutely vest in the State, and neither Congress nor the President would have any authority whatever to create a military reservation out of it. Hence the claim made in the brief of counsel, on page 34, that this has reference to Indian or military reservations created after the survey, is entirely without merit.

THE ACT OF 1889 NOT TO BE CONSTRUED AS A TREATY.

We do not concede that the construction of the act of 1889 is in any respect dependent upon the understanding of the Indians affected by it. That act was a manifestation of the policy of the Government in respect to the Indians, and it cannot be distinguished as an act of legislation, so far as rules of construction are concerned, from any other statute. The Indians may or may not have properly construed it, but clearly its terms are not to be enlarged or restricted by any meaning which they may have given it.

Counsel has fallen into what appears to us an error in assuming that the act is a treaty to be construed in the light of the doctrine announced in the several cases which he cites. It is a law pure and simple, and, like many another law, prescribes duties and measures rights. In none of the cases cited was there involved the present question, but in all of them it was the meaning of the terms which the parties themselves had adopted in framing their agreement. In such a case it is both wise and just to require that language be construed according to the understanding of unlettered savages. But where is the analogy

between a treaty so entered into and an act of Congress emanating *sua sponte* from that body?

The act of 1889 *contemplated an actual cession by the Indians.*

From the contention that the act of 1889 merely contemplates a change in form and not in substance of the pre-existing status of the lands in question we dissent. If that act means anything, as construed by the defendants, it is that there is to be a complete and perpetual destruction of the State's right to the original sections. The fee is to pass forever beyond the power of the United States to vest it in the State. It is a radical overthrow of the right ever accorded to States under such grants and implicitly relied on by the State of Minnesota, to await the extinguishment of the grant for its enjoyment.

While it is true that the State had no power to remove Indian tribes or to possess school sections during Indian occupancy, it was justified in the belief, by the whole history of governmental dealings with States enjoying similar grants, that the high moral obligation attaching to the grant to her would be fulfilled.

No sentimental consideration based upon the enfeebled or impoverished condition of Indian tribes can affect the question. And if we were now disposed to enter upon a discussion of the wisdom of a policy which was sought to preserve the tribal status of the Indian, it would not be difficult to show that it has proven a wretched failure. Indeed, the act of 1889 admits it and is a wide departure from a previously long pursued policy of government.

Not a word appears in the act of 1889 expressly referring to school sections. We therefore respectfully submit that it was the manifest purpose of Congress to refrain from any disturbance of its well-settled policy with respect to schools. Its silence upon the subject is an admission that

the legislation of 1889 was to be construed and given effect according to the usual rules of construction.

Nor is it accurate to say that the act of 1889 does not contemplate an absolute extinguishment of the Indian right. Whether we regard the Red Lake reservation as a lawfully constituted Indian reservation or mere Indian country, it was thereafter to lose that character. The Indian was to be evolved from a condition of pupilage to citizenship. He was to acquire an indefeasible title to specific lands which in time would pass from governmental control. Lands not allotted were to be sold and the proceeds thereof were to constitute a fund which in fifty years was to be distributed to the members of the respective tribes without qualification or limitation as to their using the same. Lands of whites and Indians were to be intermixed, and whites and reds were to become members of the same communities. In short, the reservation was to pass away, and the Indian was to enter upon a new life, under new conditions and a radically changed environment.

If this did not mean the extinguishment of the Indian title as those terms have been employed in many statutes and judicial and departmental decisions and opinions, we have failed to understand their meaning.

Comments on the Decision of the Secretary of the Interior, Attached to Defendants' Brief.

Some little comment upon the ground of Secretary Hitchcock's decision in denying the State sections 16 and 36 in question may be useful. We have already invited the attention of the court to the opinion of Hon. Thomas H. Carter, in which he held to the contrary. Mr. Carter, in his opinion, holds that it was the intention of Congress in granting sections 16 and 36 to include all Indian reservations and unceded Indian country, and that as soon as the Indian title became extinguished the right of the State

thereto attached. Of course, the particular sections would have to be identified by a survey. He cites the decisions of the Land Department, and after a careful examination said:

"The above decisions, taken in connection with the act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes, leave no room for doubt that, under the provisions of the act of February 26, 1857, for the admission of the State of Minnesota into the Union, said State is entitled to the 16th and 36th sections in every township within the Indian reservations in said State upon the extinguishment of the Indian title and the survey of the lands under the direction of the United States Government."

Secretary Hitchcock, however, held to the contrary. He based his opinion upon the fact that the joint resolution of March 3, 1857, modified the proposition of Congress which was accepted by the State, and that the provision "reserved for public uses," in the said resolution of March 3, included the disposition of the entire Indian country. We do not think that the joint resolution of 1857 changed the proposition made to the State and accepted in the constitution, but whether it did or not, we do not think that Congress had in mind in that resolution the disposition of an entire Indian country like the case at bar. Again, the honorable Secretary tries to distinguish the case of Beecher *vs.* Wetherbee, 95 U. S., 517, and says that in that case the survey was actually made and the title vested in the State before the treaty was made which set aside the lands for the benefit of the Stockbridge Indians. He says:

"It is shown in the opinion in that case that the section 16 there in controversy was identified by survey in May or June, 1854, so that the title thereupon passed to the State beyond the power of revocation by Congress, while the treaty establishing the reservation which was claimed to except the land from the grant to the State, did not take effect until in August following."

Here again he is in error. A reference to the fact in that case will show that the treaty concluded with the Menomonees on February 8, 1831, provided that two townships on the east side of Winnebago lake should be ceded for the use of the Stockbridge and Munsee Indians. We think this decision is directly contrary to one which he rendered later in the case of the Abandoned Military Reservations (29 Land Decisions, p. 418). In that case the grant to the Territory of Utah was substantially the same as the grant to the State of Minnesota, and provided:

"That where such sections or any part thereof have been sold or otherwise disposed of by or under authority of any act of Congress, other lands equivalent thereto," etc., "shall be selected."

On July 5, 1884, Congress passed an act which directed that whenever in the opinion of the President any lands within any military reservation had or should become useless for military purposes, he should cause the same to be placed under the control of the Secretary of the Interior for disposition as therein provided, and authorized the Secretary of the Interior to cause such lands to be surveyed and appraised, and to be sold at public sale to the highest bidder for cash at not less than the appraised value thereof, nor less than $1.25 per acre. It also provided that if they could not be sold at public sale, then they should be sold at private sale. It contained a provision for the benefit of certain settlers, whereby each settler would be entitled to enter under the homestead laws the lands occupied by him, not exceeding 160 acres. On August 23, 1894, another act was passed which read as follows:

"That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area

exceeds five thousand acres, except such legal subdivisions as have Government improvements thereon, except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given all *bona fide* settlers who are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior."

The State of Utah claimed sections 16 and 36 in this military reservation. Secretary Hitchcock held the State was entitled to the lands. We invite the court's attention to the opinion of the Secretary, in which he in substance held that the acts of July 5, 1884, and August 23, 1894, directing the disposition of the lands, did not of themselves dispose of the lands, but rather prescribed what should guide and control the Land Department in its future disposition, and construed the direction of Congress not to include these lands to which the State was entitled, citing Cooper *vs.* Roberts and Ham *vs.* State of Missouri, cases upon which we largely rely in support of our position.

The Secretary said:

"The acts of July 5, 1884, and August 23, 1894, do not purport to make a disposition of the lands to which they apply, but rather to prescribe a method which shall guide and control the Land Department in the future disposition of such lands. The two acts present a combination of the features of the homestead law and the early law authorizing sales of the public lands; but the combination surely amounts to no more than would have resulted from opening the lands to sale or homestead. An entire new scheme might have been

applied to these lands to the exclusion of all features of the old laws, but, in the absence of some uniform policy of Congress amounting to an exception of a specific class of lands from the grant to the State, as in the instance of mineral lands (Mining Co. *vs.* Consolidated Mining Co., 102 U. S., 167), no matter what the form of the authorized disposition or the conditions upon which it was to be allowed, if at the time of the admission of the State into the Union it remained a mere unexecuted provision for their future sale or disposition, they were not 'sold or otherwise disposed of by or under the authority of any act of Congress' within the meaning of the school grant and hence the title passed to the State and no subsequent proceeding in the Land Department could divest that title. There has been no uniform policy of Congress respecting the disposition of lands within abandoned military reservations and certainly none such as amounts to a specific exception of that class of lands from a grant to a State for school purposes such as is here under consideration.

"The view here taken is in harmony with the construction placed upon the expression 'otherwise disposed of' as employed in the grants made to the several States for the support of common schools.

"In the case of Ham *vs.* State of Missouri, *supra*, in construing the school grant to the State of Missouri, which is practically the same as that found in the grant to the State of Utah, it is said:

"'Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase 'or otherwise disposed of' must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the act of 1820, and the ordinance of the same year.'

"A similar construction of the phrase 'otherwise disposed of' was made by the court in the case of Cooper *vs.* Roberts (*id.*, 173), involving a construction of a school grant to the State of Michigan. The construction thus made of this phrase has stood unchallenged as far as the Department is able to find."

The acts of Congress considered by the Secretary in this opinion directed that all lands within abandoned military

reservations not already disposed of should be opened for settlement under the public land laws of the United States, and yet the Secretary held, and correctly, that this should not be construed to direct a disposition of the school sections within said military reservations. He held that it was rather a method which should guide and control the Land Department in the future disposition of the lands, but the acts there considered were as specific as the act of 1889 that we are considering in the case at bar. Neither act provides for the disposition of sections 16 and 36.

Section 6 of the act of 1889 simply directs the agricultural lands to be disposed of to actual settlers under the homestead law. This is in effect saying that the lands should be subject to entry by homesteaders. What lands? Why, the lands that would under the law as the homestead laws then stood be subject to entry. The case stands as to agricultural lands, then, just where it would if the Indians had ceded them to the United States and the homestead laws applied. They would be subject to entry, but sections 16 and 36 would not be so subject to disposition under those laws. As to the pine lands, they were to be sold to the highest bidder, but there is no indication in section 5 of this act that the State's lands were to be thus sold. On the contrary, on February 26, 1896 (29 Statutes 17), Congress provided that sections 16 and 36 should not be sold until the claim of the State thereto should be determined. The decision of the Secretary in this case follows the rules laid down by this court.

Respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

STATE OF MINNESOTA *v.* ETHAN ALLEN HITCHCOCK, Secretary of the Interior, and Binger Hermann, Commissioner of the General Land Office.	No. 4, Original.

SUPPLEMENTAL BRIEF.

THIS COURT HAS ORIGINAL JURISDICTION TO ENTERTAIN THE BILL.

Although the original jurisdiction of the Supreme Court over this case has been conceded by the Government, it is deemed wise and proper by both parties to the controversy to prepare and submit a brief statement of their views of the law on this subject. The original jurisdiction of the Supreme Court of the United States is defined in section 2, Article III, of the Constitution, as follows:

> The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a

party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

We shall discuss this question under three separate heads:

First. That this is an action between a State and citizens of another State, within the meaning of the Constitution.

Second. That for purposes of determining the jurisdictional question, this suit is not one against the United States, within the decisions of this court.

Third. That the failure to join the Chippewa Indians as parties defendant can not affect the jurisdiction of the court.

I.

THIS IS A SUIT BETWEEN A STATE AND CITIZENS OF ANOTHER STATE WITHIN THE MEANING OF THE DECISIONS.

There can be no doubt that on the face of the bill the proposition above laid down is correct. The action

was brought by the State of Minnesota against Ethan Allen Hitchcock, a citizen of the State of Missouri, and Binger Hermann, a citizen of the State of Oregon. It may, however, be suggested that these parties defendant are officers of the Government, and as such have no citizenship, or, that they are representatives of the Chippewa Indians, and that the citizenship of the Indians should not be taken into account.

Conceding that these defendants are sued in their representative capacities, we think it is well settled that in construing the clauses of the Constitution hereinabove quoted the citizenship of the parties named on the record is conclusive, and that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest.

Osborn v. *United States Bank*, 9 Wheat., 738, 856;

Foster's Federal Practice, 2d ed., vol. 1, sec. 19;

Bonnafee v. *Williams*, 3 How., 574;

Coal Co. v. *Blatchford*, 11 Wall., 172;

Childress v. *Emory*, 8 Wheat., 642;

Rice v. *Houston, Admr.*, 13 Wall., 66;

Dodge v. *Tulleys*, 144 U. S., 451, 456;

Davies v. *Lathrop*, 12 Fed., 353;

Harper v. *Norfolk & Western Ry. Co.*, 36 Fed., 102;

Shirk v. *City of Lafayette*, 52 Fed., 857.

In *Rice* v. *Houston* (*supra*), it is held that the actual citizenship of the executor or administrator controlled the jurisdiction of the court, regardless of the citizenship of the intestate or the heirs.

To the same effect was *Childress* v. *Emory* (*supra*), and other authorities cited.

In the case of *Dodge* v. *Tulleys* (*supra*), it was held that the fact that the beneficiary under a trust deed may be a citizen of the same State as the defendant, does not defeat the jurisdiction of the Federal court: that the jurisdictional question is controlled by the citizenship of the parties to the record.

To the same effect is *Bonnafee* v. *Williams* (*supra*), and other cases.

The above cases, together with those which we hereafter cite under the next heading, show conclusively that this action is against these officials personally, and that their personal citizenship should be the determining feature in any controversy as to jurisdiction. But at this point attention is specially invited to what is said in *Warner Valley Stock Co.* v. *Smith* (165 U. S., 28, *32*), respecting the nature of a suit like this.

II.

FOR PURPOSES OF DETERMINING THE JURISDICTIONAL QUESTION, THIS SUIT IS NOT TO BE DEEMED ONE AGAINST THE UNITED STATES.

It will be claimed that the United States is the real party in interest in this suit, and therefore is to be regarded as the practical defendant. If this is the proper view, then there would be, to say the least, grave doubts as to the original jurisdiction of this court to entertain the bill. The Constitution, above quoted, declares that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State

shall be a party, the Supreme Court shall have original jurisdiction."

To be sure, even if the United States should be deemed the real defendant here, the suit would still be one "in which a State shall be a party," but we apprehend that the phrase, "those in which the State shall be a party," is to be construed with reference to the previous paragraph, in which actions where a State is a party are specifically enumerated. In that enumeration there is no provision made for a suit between a State and the United States. Consequently, it might well be held that such a suit would not be within the original jurisdiction of the Supreme Court.

It is, however, well settled that the United States is not the defendant within the decisions of this court. The question here suggested received very elaborate consideration by Chief Justice Marshall in the case of *Osborn* v. *United States Bank* (*supra*). In that case the State of Ohio had levied a tax upon the branch of the Bank of the United States located in that State, which the bank refused to pay. Osborn, the auditor of the State, being about to proceed to collect the State tax by a seizure of the money of the bank in its vaults, an injunction was sued out against him in the circuit court of the United States on the prayer of the bank. Subsequently, an amended bill was filed, alleging that the said Osborn had so seized $100,000, and had delivered the same to the treasurer of the State, one Curry, who afterwards turned the money over to his successor, one Sullivan. Both Curry and Sullivan were

made defendants as well as Osborn and his assistant, Harper. It was conceded that the State of Ohio, though not made a defendant to the bill, was the real party in interest. It was also conceded that the State could not be sued. On this state of facts it was earnestly argued that, since all the parties sued were the officers of the State and since the suit involved acts done in their official character and in obedience to the laws of the State, the complainant was attempting to accomplish by indirection what he could not do directly. Chief Justice Marshall gave this objection extremely careful consideration, and in the course of a lengthy opinion held that in deciding a question of jurisdiction where jurisdiction depends upon parties to the litigation, the court should limit itself to an inspection of the record. He said:

> The process is substantially, though not in form, against the State, * * * and the direct interest of the State in the suit is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of the bank, * * * and the very difficult question is to be decided, whether, in such a case, the court may act upon agents employed by the State, and on the property in their hands.
>
> In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government

is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States." Again: "The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record." Again: "In cases where a State is a party on the record the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

The doctrine of *Osborn* v. *Bank of the United States* has been followed in numerous cases:

Davis v. *Gray*, 16 Wall., 203;
Tomlinson v. *Branch*, 15 Wall., 460;
Litchfield v. *Webster*, 101 U. S., 773;
United States v. *Lee*, 106 U. S., 212;

Allen v. *B. & O. R. R.*, 114 U. S., 311;
Board of Liquidation v. *McComb*, 92 U. S., 531;
Poindexter v. *Greenhow*, 114 U. S., 270;
Pennoyer v. *McConnaughy*, 140 U. S., 1;
Illinois Central R. R. Co. v. *Adams*, 180 U. S., 28, 37.

In *Davis* v. *Gray* (*supra*) a citizen of New York filed his bill in the circuit court of the United States for the district of Texas against Davis, the governor of the State, and Kuechler, Commissioner of the General Land Office, to restrain them from selling the lands which the railroad claimed as a part of its grant. To this bill the defendants demurred, on the ground that the court had no jurisdiction, because the same was in effect a suit against the State. The court, restating the propositions decided in *Osborn* v. *The Bank*, said:

> The circuit court of the United States, in a proper case in equity, may enjoin the State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant. * * *
>
> In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and a State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

In *Poindexter* v. *Greenhow* (*supra*) Poindexter tendered to the treasurer of Virginia coupons, as provided by the act of 1871, in payment of taxes. They were refused, and his property was seized for taxes. This was an action against Greenhow, the treasurer, before the police justice, for the value of a desk so seized. It was claimed that this was a suit against the State; that the tax collector was sued as an officer and agent of the State engaged in collecting its revenues under a valid law; that he was guilty of no wrong, but acted only in an official capacity, representing the State and obeying the commands of a statute of the State, and that if any wrong had been done it was by the State. The court held that an officer of the State who seeks to substitute the State, or to defend on the ground that the State has adopted his act and exonerated him, must produce a valid law which authorizes his acts. If he is acting under an unconstitutional act, or under an act which does not furnish sufficient authority, or without authority at all, his acts are personal, although what he does he claims to do as an officer of the State.

In *Pennoyer* v. *McConnaughy* (*supra*), a suit was brought against the governor, secretary of state, and treasurer of the State of Oregon, who constituted a board of commissioners for the sale of school lands, to enjoin them from selling and disposing of the swamp lands claimed by this complainant. The defendant claimed that they were selling the lands pursuant to a law of the State, and as such were acting as officers of the State. The court held that the law under which

they were claiming to act was insufficient authority, and sustained the jurisdiction.

These authorities, holding that a suit to enjoin a State official is not a suit against a State, apply with equal force to a suit to enjoin a Government official, because the United States can not be sued without its own consent, which consent can only be given by an act of Congress. (*United States* v. *Lee*, 106 U. S., 216.)

We do not wish to be understood as asserting that an action brought against an official of a State or of the United States should in all cases be regarded as an action against the official personally, rather than as an action against the State or the National Government, as the case may be. Any attempt to control a public official in the exercise of his discretionary powers will, of course, be treated as to all intents and purposes an action against the political body which the officer represents. There is no doubt that the officials of a State may in certain aspects stand for the State, representing its action and liability. Wherever these aspects are drawn into controversy, the State, though not a party to the record, will doubtless be the real party against which the judgment would operate. So also, in the cases where proceedings are instituted against an official of the State of such nature as to involve a conflict with the political department of the Government, the bill will be dismissed.

But the class of cases above cited, whose authority we invoke and within whose doctrine we clearly come, hold that where a suit is brought against defendants

who, claiming to act as officers of a State or of the United States, and under the color of an unconstitutional statute or a statute which does not furnish authority, or who act wholly without authority, commit acts of wrong and injury to the rights and property of the complainant, such suit is not an action against the State, but is rather one against the officers personally, in which case their citizenship would determine any question of jurisdiction.

In those cases where the jurisdiction of this court has been invoked to enjoin the action or threatened action of Government officials, the original jurisdiction of this court has been not only exercised but expressly conceded.

State of Mississippi v. *Johnson*, 4 Wall., 474;
State of Georgia v. *Stanton*, 6 Wall., 75;

The case of *Mississippi* v. *Johnson* was a motion for leave to file a bill in the name of the State of Mississippi against Andrew Johnson (specially therein alleged to be a citizen of Tennessee and President of the United States), and his officers and agents appointed for that purpose, to prevent them from carrying out the so-called reconstruction act of Congress. Of course the citizenship of the President was the only ground on which the jurisdiction could possibly have been invoked, and if this court had not original jurisdiction this was a complete answer to the motion for leave to file the bill. Instead of holding, however, that the case did not come within the court's original jurisdiction, and therefore denying the motion forthwith, the

case was disposed of by the consideration and decision of other questions of such delicacy and importance as to forbid their examination in any case not imperatively demanding it. The court held that the acts sought to be enjoined were the acts of the executive head of the Government in the exercise of his political duties under the acts of Congress. The court said:

> In is true that the State may file an original bill in this court, and it may be true in some cases that such a bill may be filed against the United States; but we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us.

The case of *Georgia* v. *Stanton* was a similar case. A bill was filed against Stanton, Secretary of War, General Grant, General of the Army, and Pope, major-general, assigned to the command of the third military district, consisting of the States of Georgia, Florida, and Alabama, to enjoin them from carrying out the several provisions of the reconstruction act. The defendants moved to dismiss the bill for want of jurisdiction. The first objection made was as to the parties. It was claimed that they were sued as officers of the United States and not as individuals, and that they had no residence, no State citizenship within the meaning of the Constitution of the United States. The next objection made was as to the nature of the right set up in the bill, whether the acts threatened were such acts as any court would interfere with. The

court held that the requisite citizenship existed to give that court jurisdiction, but held that the court had no jurisdiction over the subject-matter. The court said:

> By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," etc., and as applicable to the case in hand, "to controversies between a State and citizens of another State," which controversies, under the judiciary act, may be brought in the first instance before this court in the exercise of its original jurisdiction, and we agree that the bill filed presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction; that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights which do not belong to the jurisdiction of a court, either in law or equity.

In the *Wheeling Bridge case* (13 How., 518) the court says, at page 560:

> From the dignity of the State the Constitution gives it the right to bring an original suit in this court.

The case at bar is one of the cases most suitable for

the invocation of this original jurisdiction. Manifestly the State can appeal to no other court for an injunction against this threatened action, unless, possibly, it be the courts of the District of Columbia; but this important question would certainly not stop in those courts. The jurisdiction was conferred upon this court for the very purpose of enabling the several States to bring these great controversies into a tribunal in keeping with the dignity of a State under the Constitution, and for the further purpose of removing such controversies from courts which might perhaps be influenced by local prejudice. The judicial history of this country shows that such controversies are few and usually of great importance.

We have already seen that the acts we are seeking to enjoin are not matters of discretion with the Secretary of the Interior, or acts in carrying out the political duties of an officer of the Government; we are seeking to enjoin him from clouding the title of lands which we claim have passed beyond the Land Department, and the fee of which is vested in the State of Minnesota. Simply to illustrate this question, we call the court's attention to the fact that when this bill was filed the surveys had been made in this Indian country; that no patent, no certificate, no action of the Secretary of the Interior or of the Commissioner of the General Land Office was necessary to vest the title in the State, but that the lands had passed beyond the control of the Secretary, and his action in allowing settlers to homestead these lands and issuing to them

patents would tend to cloud our title, and should be enjoined. This court has passed upon this question many times.

Brown v. *Hitchcock*, 173 U. S., 473;
Warner v. *Smith*, 165 U. S.. 28;
United States v. *Schurz*, 102 U. S., 378;
Noble v. *Union River Logging R. R. Co.*, 147 U. S., 165.

In *Brown* v. *Hitchcock* the court declined to issue the injunction because the title of the lands was still in the Government. It required a patent to pass the fee of the swamp lands to the State, and the court would not interfere with the administration of the land department while it still retained jurisdiction over the subject-matter, but recognized the distinction we refer to and cited authorities thereon.

In *United States* v. *Schurz* (*supra*) the court held that the lands having ceased to be a part of the public domain the Secretary's jurisdiction to determine any conflicting claim to them had absolutely ceased, and his action might be controlled.

In *Noble* v. *Union River Logging R. R. Co.* (*supra*) an injunction was issued to prevent the Secretary of the Interior from interfering with the title which had already vested.

The case of *Warner Valley Stock Co.* v. *Smith* (*supra*) was a bill in equity to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from revoking the action of their predecessors in office in certifying swamp lands to the State of Oregon,

claiming that the lands had passed beyond the jurisdiction of the Interior Department. The bill was dismissed because, pending the decision of the case, Hoke Smith, the then Secretary of the Interior, had gone out of office, but the right to grant the injunction was not questioned. Congress subsequently passed an act authorizing the continuance of the action against the succeeding Secretary.

III.

THE FAILURE TO JOIN THE CHIPPEWA INDIANS AS PARTIES DEFENDANT CAN NOT AFFECT THE JURISDICTION OF THE COURT.

As stated by the counsel for the defendants in his oral argument, it was suggested in the answer in this cause that the court had no jurisdiction by reason of the facts that the Chippewa Indians in Minnesota are necessary parties, and that some of them are citizens. This objection is not insisted on by the counsel, but, nevertheless, we deem it wise to submit the following suggestions:

There are insuperable difficulties in the way of joining the Indians as defendants in this action. In the first place, they are too numerous; it would be impossible to join them and to secure the names of all the Chippewa Indians in Minnesota, not to speak of securing service upon them. In the second place, assuming that it is possible to secure the names, or even join a few as representatives of the whole body, such a course would oust the jurisdiction of this court. There is no court whose process could reach the Indians which

could have jurisdiction to restrain the defendants from disposing of or clouding the title to these lands. The process of the circuit court of Minnesota would not run to the defendants; the process of the courts of the District of Columbia would not run to the Indians. But the Indians are not necessary parties in any event. To be sure, the money realized from a sale of the timber and from the homestead settlements to be made in the future is from time to time to be paid into the Treasury of the United States. The United States is the owner of the money. To be sure, it is deposited in the Treasury to the credit of the Indians, and is to draw interest at 5 per cent. After paying the expenses, one-half of the interest for a period of fifty years is to be paid annually in equal shares to the heads of families and guardians of orphan minors for their issue, one-fourth of the interest is to be paid annually in cash in equal shares per capita to all other classes of Indians, and one-fourth is to be used for the establishment of schools. At the expiration of the fifty years said permanent fund is to be divided among the Chippewa Indians and their issue then living, in cash in equal shares, etc.

Manifestly it is impossible to make parties to this suit the future beneficiaries of this fund. The present heads of families can not very well represent a generation unborn. But beyond all of this, the Indian had no title to the land. His right is merely possessory. The proceeds of these homestead entries and sale of

timber is a gift from the Government to all Chippewa Indians in Minnesota—not only to those residing within the boundaries of the country in question in this case, but to the Chippewa Indians residing on the other reservations in the State. We merely mention this as showing that this is an appropriation of funds for the support, maintenance, and benefit of the Indians, in which the title is in the United States, and in which no particular Indian has such an interest as to make him a necessary party to this record.

The United States through its agents appears as a natural guardian and proper representative of the Indians. Throughout the long course of decision in this court it has been held that the relation between the Government and the Indians is one similar to that of guardian and ward, and that the Indians may be looked upon as in a state of pupilage. This was laid down in very emphatic terms by Chief Justice Marshall in 1831 in the case of the *Cherokee Nation* against *The State of Georgia* (5 Peters, 1). In that case a bill was brought by the Cherokee Nation praying an injunction to restrain the State of Georgia from the execution of certain laws of that State. The objection was raised that an Indian tribe or nation, such as the Cherokee Nation, was not a foreign nation within the meaning of the Constitution, and that therefore the Cherokees could not sue in this manner in the United States courts. It was held that the objection was well taken. In the course of his opinion the learned Chief Justice

took occasion to describe the legal status of Indians in general. He said:

> They may, more correctly perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

The same doctrine was laid down again in the following year by Chief Justice Marshall in *Worcester* v. *State of Georgia* (6 Peters, 515).

It may be admitted that the executive and legislative departments of the Government were very slow to recognize the principles which were so clearly enunciated in the above-mentioned decisions. From the period of the foundation of the Government down to the year 1871 the practice was to deal with the Indian tribes by means of treaties; thus, so far as outward forms were concerned, the Indians would

appear to be separate and independent national entities. It is safe to say, however, that the treaty system had come to be a mere farce long before it was done away with. It was always recognized as a matter of actual practice that the Indians were in a state of pupilage and would be treated just as the sovereign power might see fit to treat them. The views laid down by Chief Justice Marshall in the early cases represented the actual practice even though the outward form seemed to betoken a different state of affairs.

In 1871 (16 Stat., p. 566) Congress passed an act reciting that henceforward the Indian tribes should not be negotiated with by means of treaty, but that all matters respecting the Indians should be the subject of ordinary Congressional enactment. This step was regarded by General Walker, formerly Commissioner of Indian Affairs, as a fatal blow to tribal autonomy. Logically it was. As a matter of fact, however, it was the result of a struggle between the two Houses of Congress for control over Indian affairs. Hitherto, while the treaty-making system was in force, the Senate had been supreme, but under the new arrangement the House was to claim a share in the settlement of all such questions.

With the decisions in this court from the time of Marshall to the eighties we need not concern ourselves further than to say that the doctrine first laid down remained undisturbed. The Indian question was not particularly imminent during those years.

In 1884, in *Elk* v. *Wilkins* (112 U. S., 94), the question was raised in this court whether an Indian, born a member of one of the Indian tribes, became a citizen of the United States within the meaning of the first section of the fourteenth amendment merely by reason of his birth within the United States and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens. The question was resolved in the negative, the court holding that the Indian was not "born in the United States and subject to the jurisdiction thereof" within the meaning of that section. Justice Gray, speaking for the court, said:

> The Indian tribes being within the territorial limits of the United States were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. * * *

In 1885 Congress took a further step in the process of assuming direct control over the Indians by providing that thereafter Indians should be punished for committing upon Indians, or others, any one of the seven leading crimes. The principle upon which this statute was framed was that the United States had full jurisdiction over the Indians upon their reservation whether in a State or Territory. The constitutionality of this statute was at one attacked. There had been various dicta in previous decisions of the court which seemed to warrant an interference inimical to the validity of the statute.

In 1886 this court took occasion, in the case of the *United States* v. *Kagama* (118 U. S., 375), to put the entire question at rest. The case arose on a demurrer to an indictment against two Indians for murder committed on an Indian reservation in the State of California, the person murdered being also an Indian of the said reservation. The crime was clearly one within the purview of the statute, and the principal question to be determined in the case was whether the statute was valid. In a very careful opinion delivered by Mr. Justice Miller, the court reviewed the earlier cases and decided in favor of the constitutionality of the law. The court said:

> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance

> to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. * * *
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> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The decision in *The United States* v. *Kagama* was a clear and decisive enunciation of the law, and has been followed ever since. While there may have been some doubt in the minds of many as to the true status of the Indian prior to that time, it can not well be said that the question remained open to argument after that case was decided.

By that decision the duty and the responsibility were brought home to the Government, and all that

has been done since 1866 with regard to the government and control of the Indians has been in full accord with the principles laid down by the Supreme Court at that time.

The final stage in the development of this subject is found in the Dawes Act, passed in February, 1887, a few months after the decision above referred to. This act opened up the way for the final settlement of the whole Indian question. We do not deem it necessary to go into the details of that legislation. The net result of it was to confer upon the President power to make the Indian a landowner in severalty and a citizen of the United States even against his will.

It will be noticed from the above summary of the course of decision and legislation on the Indian question that all three departments of the Government have always maintained the theory that the Indian is a dependent subject, to be treated in all respects as a ward or an incompetent. Congress has repeatedly given evidence of its attitude as a guardian. Nothing could be more arbitrary than the legislation which has been referred to, and this court has signified its intention of following the political departments of the Government in all such matters. (*United States* v. *Holiday*, 3 Wall., 407.)

One or two of the later decisions may be mentioned to show that the doctrine of guardianship remains in force at the present day.

Cherokee Nation v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 653;

Stephens v. *Cherokee Nation*, 174 U. S., 445, 483;

Jones v. *Meehan*, 175 U. S., 1;

United States v. *Flournoy Live Stock Co.*, 71 Fed., 576;

United States v. *Choctaw Nation*, 119 U. S., 1;

Barker v. *Harvey*, 181 U. S., 492.

The first of the cases above cited contains a very elaborate review of the authorities, and we recommend it to the attention of the court.

In *Jones* v. *Meehan* (*supra*), the court said:

> The Indian tribes within the limits of the United States are not foreign nations; though distinct political communities, they are in a dependent condition; and Chief Justice Marshall's description, that "they are in a state of pupilage" and "their relation to the United States resembles that of a ward to his guardian," has become more and more appropriate as they have grown less powerful and more dependent.

We have cited the case of the *United States* v. *Flournoy Live Stock Company* (*supra*), as showing that the state of pupilage has by no means disappeared under the operation of the Dawes Act; in other words, the fact that the Indians have become, or are becoming, citizens, is as yet unimportant. They are still "wards of the nation" and subject to the control of the National Government. In the case in 71 Federal, it was contended that because the Indians in question were declared to be citizens of the United States, all restrictions upon the right of alienation contained in the acts

of Congress under which the allotments in severalty were made were wholly void. The contention was overruled. It was held that citizenship, lapse of time, and the allotment of portions of reservations in severalty had not terminated the former relationship existing between the Government and the Indians. The Interior Department still retained supervision and control as before.

Besides this opinion by Judge Shiras, see also:

McKenna, J., in *Eells* v. *Ross*, 64 Fed., 417;
Smythe v. *Henry*, 41 Fed., 705;
Re Coombs, Ref'r, 127 Mass., 278;
United States v. *Logan*, 105 Fed., 240.

In all reason this should be so because the legislation itself presupposes the fact that the Indians were never more dependent than now. The act of January 14, 1889, which this court is here called upon to construe, is clearly indicative of the subordinate position to which the Indians have sunk. For example, Congress has provided in that act that the consent of two-thirds of these Chippewa Indians shall divest the whole tribe of its lands and bring about a cession thereof to the United States for the purposes named in the act. Such legislation enacted with respect to another community or class of persons would be regarded as high-handed in the extreme, yet enacted as it is, with respect to the Indians, it stands unquestioned.

In view of what Congress has done and in view of what this court has decided during the past hundred years, we say that the proposition that these Indians

are properly represented in this action brought in its present form is indisputable. The Interior Department, and through it the Government of the United States, has always been regarded as the true guardian and representative of the Indians. Can it be said that such legislation as we have mentioned is permissible, and at the same time be said that the Government can not appear for the Indians as a guardian ad litem? We feel that the historical aspect of the situation as we have outlined it is absolutely conclusive on this branch of the case.

The case is within the rule that a trustee may sue or be sued without the appearance of his beneficiary in the action, where the trust is of such a nature as to warrant the construction that the trustee has been authorized to appear in behalf of the beneficiary. The rule referred to has been laid down in—

Carey v. *Brown*, 92 U. S. 171;
Kerrison v. *Stewart*, 93 U. S. 155;
Vetterlein v. *Barnes*, 124 U. S. 168.

In *Kerrison* v. *Stewart* (*supra*), it was said:

> It can not be doubted, that under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does.

> If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw* v. *Norfolk Co. R. R. Co.*, 5 Gray, 171; *Bifield* v. *Taylor*, 1 Beat, 91; *Campbell* v. *R. R. Co.*, 1 Woods, 376; *Ashton* v. *Atlantic Bank*, 3 Allen, 220); or to one by a stranger against him to defeat it in whole or in part (*Rogers* v. *Rogers*, 3 Paige, 379; *Wakeman* v. *Grover*, 4 id., 34; *Winslow* v. *M. & P. R. R. Co.*, 4 Minn., 317; *Campbell* v. *Watson*, 8 Ohio, 500). In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party.

In *Vetterlein* v. *Barnes* (*supra*) the action was one by a stranger against the trustee for the purpose of defeating the trust altogether. It was held that the beneficiary was not a necessary party.

> It is contended that the wife and children of Theodore H. Vetterlein were indispensable parties, and that it was an error to proceed to a final decree without having them made defendants. The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties, so that the court may "finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it." (*Story* v. *Livingston*, 13 Pet., 359, 375; *Shields* v. *Barrow*, 17 How., 130, 139.) But in a suit brought against a trustee by a stranger for the purpose of defeating the trust

altogether, the beneficiaries are not necessary parties, if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him as well as by what is done by him." In such cases of representation by trustees, the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party." (*Kerrison* v. *Stewart*, 93 U. S., 155, 160.)

In *Sears* v. *Hardy* (120 Mass., 524, 529) the court, after observing that who shall be made parties to a suit in equity can not always be determined by definite rules, but rests to some degree in the discretion of the court, said: "Generally speaking, however, to a suit against trustees to enforce the execution of a trust, cestuis que trust, claiming present interests directly opposed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defense made by the trustees, or to resort to a subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence." But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void. In *Rogers* v. *Rogers* (3 Paige, 379), which was a suit by a judgment creditor to set aside as fraudulent an assignment by the debtor

> of his personal estate in trust for the payment of a debt to a particular bank, and to pay the residue of the proceeds thereof to other creditors of the assignor, it was objected, at the hearing, that the bank was not made a party defendant. The objection was held to be untenable, the chancellor observing: "As a general rule, the cestuis que trust, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the cestui que trust. (*Wakeman* v. *Grover*, 4 Paige, 23; *Irwin* v. *Keen*, 3 Wharton, 347, 354, 355; *Therasson* v. *Hickok*, 37 Vt., 454; *Hunt* v. *Weiner*, 39 Ark., 70, 76; *Winslow* v. *Minnesota and Pacific Railroad Co.*, 4 Minn., 313, 316; *Tucker* v. *Zimmerman*, 61 Geo., 601.)

In the case at bar the Government is indisputably to be regarded, if not a guardian, at least a trustee for the Indians; furthermore, if the Government is to be looked upon as a trustee, it must be a trustee with the widest possible powers. This follows from the general course of dealing and the general relationship existing between the Government and the Indians. If there ever was a case where a trustee should be regarded as empowered to represent his cestui que trust in litigation, this certainly is such a case.

On analogy drawn from the rule excluding legatees and next of kin in bills for a debt or legacy brought against the personal representative of a deceased person the Indians need not be joined in this action. Adams in his Doctrine of Equity, pages 315, 316, says:

> The rule requiring the joinder of all persons whose interests the decree may affect is subject to two modifications, which at first sight appear to be exceptions, but which are in reality mere limitations of its effect, originating in the same principles as the rule itself. The first of these modifications is the exclusion of legatees or next of kin on bills for a debt or legacy against the personal representative. * * *
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> The exclusion of legatees or next of kin on a bill for a debt or legacy against the personal representative originates in the assumption that such legatees or next of kin have in reality no interest in the object of the suit; for although they are in some sense concerned in it, yet it is only in the same sense in which every creditor is concerned in the management of his debtor's estate; viz, it is important to them that the ability to meet their claims should not be diminished; but the personal representative is not a trustee for them, nor have they any interest in the estate itself. If the claimants are not mere legatees, payable by the executor, but specific owners of the property itself, the ordinary rule applies; e. g., where they take as appointees under a married woman's will, or where their legacies are charged on real estate. In this latter instance, however, a modification

> has lately been introduced, assimilating to some extent a devisee on trust with a personal representative; and it is directed that in all suits concerning real estate which is vested by devise in trustees, who are competent to sell and to give discharges for the purchase money and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the same manner and to the same extent as the executors or administrators in suits concerning personal estate; and it shall not be necessary to make the persons beneficially interested parties to the suit. But the court may, at the hearing, require them to be joined if it shall think fit.

The rule here quoted and the reason of it are clearly applicable to the situation which we are considering. The position of the Indians in this case is analogous to that of legatees under a will. It is universally recognized that they have no title to the soil beyond that of occupancy. If the Government sees fit to take this land, sell it, and hold the proceeds in trust for them, it is a pure gift on the part of the Government. The State of Minnesota is practically in the position of a creditor of the Government seeking to subject the fund to its claim, which antedated that of the Indian, which in turn took its rise from the act of 1889.

So far as this question of jurisdiction could be settled by the legislative and executive departments of the Government, it has been put to rest by the act of March 2, 1901. (31 Stat., 950.)

AN ACT authorizing the Attorney-General, upon the request of the Secretary of the Interior, to appear in suits brought by States relative to school lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney-General upon the request of such Secretary.

The question of the constitutionality of this act, if such question should ever be raised, we do not propose to argue at length at this time.

We assume that the act is valid and at any rate should be permitted to stand until attacked and held void. It would seem if Congress has power to pass an act, such as that of January 14, 1889, providing for the cession of Indian lands by a two-thirds vote of the Indians claiming such lands, then certainly Congress should be competent to enact a law permitting the Secretary of the Interior to represent the Indians in

litigation instituted in this court. If the act of March 2, 1901, is unconstitutional, then we say that most, if not all, of the legislation of the past fifty years with respect to the Indians is also bad. The position of the Indian as a "ward of the nation" is a final justification for the act of 1901, as it was for the act of 1871, the act of 1885, the act of 1887, and the act of 1889. The decisions of Justices Shiras and McKenna furnish a complete refutation of the argument that the Indian's rights as a citizen are being impaired. Citizenship does not yet carry with it emancipation from governmental guardianship.

This act also gives legislative recognition to this court's original jurisdiction of such a suit as this. True, the act does not use the words "original jurisdiction," but the language employed is their full equivalent. The provision declaring that the Indians need not be made parties shows that the jurisdiction which is being legislated about is original and not appellate. Then, how could a suit be *instituted* in this court except by invoking its original jurisdiction? The suit provided for is one "to determine the right of a State" and to which the Secretary of the Interior is to be a party, and, as shown by the context, a party defendant.

Respectfully submitted.

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I join complainant's counsel in their discussion herein of the subject of this court's original jurisdiction of a suit like this.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

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